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No. 03-1601

IN THE

Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,
Petitioners,

v.

MARK J. ABRAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF CERTAIN INDIVIDUAL RANCHO PALOS VERDES RESIDENTS, PROPERTY OWNERS AND TAXPAYERS AND UNITED RADIO AMATEUR CLUB, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE* [1]

Amici Don Reeves, Barry Hildebrand, Harold Hermann, Sunshine, Skip Hansen, and Joe Lai are residents, property owners and taxpayers of Petitioner City of Rancho Palos

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of *amicus curiae* briefs in this case and have filed blanket consent letters with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Verdes whose own property uses will be affected by the outcome of this case. Further, they benefit from the provision of personal wireless services in the City and are concerned that the inability of small businesses and entrepreneurial personal wireless service providers to seek recourse to 42 U.S.C. §§ 1983 and 1988 will remove a significant incentive for the City to faithfully comply with the Telecommunications Act of 1996 with the effect that it will impair the development of a more robust wireless services infrastructure in a community that now suffers from inadequate service to the ultimate injury of the *amici* and other residents who benefit from that infrastructure.

Amicus United Radio Amateur Club, Inc., a California non-profit mutual benefit corporation, is an organization of amateur radio operators whose members include residents, property owners and taxpayers in the City of Rancho Palos Verdes who will suffer similar harm as the above-named *amici* if the Court forecloses access to 42 U.S.C. §§ 1983 and 1988 by personal wireless service providers.

QUESTION PRESENTED

Where a municipality violates the rights of an individual as established by the Telecommunications Act of 1996, specifically 47 U.S.C. § 332(c)(7)(B), may the injured individual assert a claim for damages under 42 U.S.C. § 1983 and attorney's fees under 42 U.S.C. § 1988(b)?

ARGUMENT

Respondent Mark Abrams, a licensed amateur radio operator and antenna owner who also provides commercial mobile radio services from his home, has been the target of a years-long crusade by City of Rancho Palos Verdes officials who have used virtually every administrative and legal means to force him to submit to their will. The District Court having determined that the City violated the Telecommunications

Act of 1996 (TCA) and Abrams having withstood the *in terrorem* financial assault of years of litigation against a municipal corporation of superior means, Abrams now seeks to collect recompense of attorney's fees under 42 U.S.C. § 1988(b) and damages under 42 U.S.C. § 1983.

I. THE NINTH CIRCUIT CORRECTLY HELD THAT THE TELECOMMUNICATIONS ACT OF 1996 ESTABLISHES A FEDERAL RIGHT AND THAT THIS RIGHT IS SUBJECT TO 42 U.S.C. §§ 1983 AND 1988

A. 47 U.S.C. § 332(c)(7)(B) Unambiguously Confers a Federal Right

Consistent with the Court's direction in *Blessing v. Freestone*, 520 U.S. 329 (1997), the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B), unambiguously confers rights on specific parties ("any person adversely affected by any final action or failure to act . . . that is inconsistent with this subparagraph") to enforce the mandatory provisions of 47 U.S.C. § 332(c)(7)(B)(i)-(iv) in a manner that binds "State or local government or any instrumentality thereof."

In contrast to the cases cited in *Gonzaga v. Doe*, 536 U.S. 273 (2002), the rights conferred by 47 U.S.C. § 332 (c)(7)(B) do not arise from presumptions relating to a funding provision.

Contrary to the dictum *Amici* State of Alabama, *et al.*, cite from *Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942), and distinguished in *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972), the authority of the Court and Mr. Abrams' standing to sue are not at issue in this case. *Amici* State of Alabama, *et al.*, put too much weight on a comment in *Scripps-Howard* that was not necessary to the issue being decided and merely served to make a point: namely that, even if entirely public—as opposed to private—interests were at risk, the Court would

still have the power to stay administrative actions. This Court said as much in *Sierra Club* when it referred to the cited passage, as "a dictum" in holding that the Sierra Club's mere interest in a public issue, absent some private injury, was insufficient to establish standing.

B. 47 U.S.C. § 332(c)(7) Does Not Establish a Remedial Scheme So Comprehensive As to Establish Congressional Intent to Foreclose § 1983 Remedies

In the absence of an express Congressional prohibition against recourse to § 1983, Petitioners must establish that Congress *implied* a prohibition by creating an enforcement scheme so comprehensive and exclusive that it is incompatible with individual enforcement under § 1983. *Blessing* at 341.

It is established that the presumption *favors* application of § 1983 and that the burden is on the opponent to overcome this presumption. *Blessing* at 341.

Petitioners and *Amici* State of Alabama, *et al.*, appear to argue that the only statutes subject to § 1983 would be those where a federal right was created with nothing more. Under their interpretation, only the utter silence of Congress in the matter of individually-enforceable remedies at law would satisfy the presumption favoring application of § 1983. Any mention whatsoever of individual access to the courts would necessarily be construed as a remedy so comprehensive and exclusive as to preclude the application of § 1983. Br. of Petitioners at 33-34; Br. of *Amici* State of Alabama, *et al.*, at 10-12.

C. "Expedited Review" and a 30-day Limitations Period Benefit the Wrongdoers, Not the Respondent

Amici National League of Cities, *et al.*, point out that the parties served by the provision in 47 U.S.C. § 332(c)(7)(B) for an "expedited review" are the municipalities themselves. Br. of *Amici* National League of Cities, *et al.*, at 19.

If anything, the necessity that Mr. Abrams rush out and find a competent attorney in an esoteric field of law to file suit within a very short period of limitations only adds to the financial inequities burdening injured individuals and small entrepreneurs like Abrams and should favor the application of § 1983 to balance the equities to aid "the proverbial little guys." Br. of *Amici* State of Alabama, *et al.*, at 18.

II. THE BALANCE OF EQUITIES FAVORS INDIVIDUALS SUCH AS ABRAMS OVER OFFICIALS WITH THE POWER OF THE PUBLIC PURSE

The balance of financial equities attending the Ninth Circuit's application of §§ 1983 and 1988 favors individuals and small entrepreneurs like Abrams, who face the very real prospect of personal bankruptcy should they be so unfortunate as to end up in court against City Hall.

The Petitioners and supporting *amici curiae* essentially argue that, if they violate an individual's rights with regard to an antenna zoning decision, and if the injured individual has the strength of character and determination to overcome years of aggressive litigation and appeals by a government party of significantly superior financial backing that is often able to spread the risk through mutual insurance pools (Br. for *Amici Curiae* National League of Cities, *et al.*, at 21), the worst that can happen is the municipal corporation might be ordered to stop doing the bad act. This is an empty remedy with no deterrence value to curb government abuse.

Although Petitioners and supporting *amici curiae* raise the specter of impecunious municipal governments subject to potential liability for damages and attorney's fees when they 'innocently' misapply federal law (Br. for *Amici Curiae* National League of Cities, *et al.*, at 20, 21-23), and assert that "telecommunications conglomerates" are the typical plaintiffs who would seek to assert § 1988 (Br. for *Amici Curiae* National League of Cities, *et al.*, at 4), it is injured small entrepreneurs like Mark Abrams who are far more likely to be the victims of aggressive government zoning officials.

Most individuals on the wrong-side of municipal zoning decisions do not have attorneys on retainer, nor do they have networks of relationships with legal experts in esoteric fields like antenna zoning law.

Governments, on the other hand, have legal experts on staff or retainer, years of corporate knowledge, and a plethora of special associations such as *Amicus* California State Association of Counties (CSAC), *Amicus* League of California Cities, etc., to enable them to field legal teams with the best reputations and experience. Government officials often have armies of staff members, code enforcement officers, police agencies, investigators, hearing officers and attorneys, all on the government payroll, to assert their administrative remedies, criminal and civil sanctions.

Although the National League of Cities, *et al.*, assert the tired canard that money spent to pay damages awards would detract from money spent on police and fire service (Br. of *Amici* National League of Cities, *et al.*, at 21), they hope the Court will ignore the reality that government officials often find it convenient to spend other people's money to prove a point or to flex their political muscles.

Perhaps the only reason the Court has the opportunity to review this case is because Mark Abrams is rare in that he's had the strength of character and modest financial ability to stick it out this far.

In many cases, legal rights, statutes and precedent are of no succor to impecunious individuals because the *only* factor affecting the outcome of many zoning decisions is whether one has the financial wherewithal to withstand the full force of aggressive code enforcement and litigation by City Hall. Without the ability to assert § 1983, these individuals will continue to suffer in silence.

The planning decisions by the City of Rancho Palos Verdes in this case were not necessarily matters of innocent "misapplication" of federal law. Mr. Abrams was subjected to often angry and contentious public hearings where public officials attacked his character and made him the object of public opprobrium. City officials made it abundantly clear that they intended to restrict antenna permits, and especially commercial antennas, regardless of what laws were enacted by higher echelons of government. City officials drafted the City's antenna zoning ordinance to craft provisions that singled-out specific property and antenna owners in an attempt to effectively prohibit their services.

Based upon our observations and experience as residents of the City of Rancho Palos Verdes, it appears that many times the City pushes matters to litigation that easily could be settled, if only because its relatively greater financial strength gives it an advantage in a legal forum. City officials have actually raised the prospect of *in terrorem* legal expenses suffered through long and aggressive litigation in dissuading individuals from challenging the City and they have admittedly engaged in such tactics during litigation. As a result, many citizens and local extrepreneurs live with an abiding fear of retaliatory code enforcement and permit denials.

Without the potential risk of having to pay damages or attorney's fees, municipalities will have every incentive to aggressively assert local zoning ordinances potentially inconsistent with the TCA and to postpone or deny satisfaction of injuries through aggressive litigation.

Although our taxes may be used to pay attorney's fees and damages when cities abuse their zoning powers, as taxpaying landowners we are much more concerned about the prospect that a U.S. Supreme Court judgment in favor of the Petitioners would tend to aggravate the arrogance of municipalities that seek to aggressively assert local zoning regulations inconsistent with the TCA that are injurious to entrepreneurs like Mr. Abrams and the citizenry that benefits from the provision of such wireless services.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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